

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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KATHY BUTTON,

Plaintiff/Appellee/Cross-Appellee,

v

OAKLAND LIVINGSTON HUMAN SERVICE  
AGENCY,

Defendant/Appellant/Cross-  
Appellee,

and

GUARDIAN CARE, INC.,

Defendant/Appellee/Cross-  
Appellant.

UNPUBLISHED

August 14, 2014

No. 314952

Livingston Probate Court

LC No. 12-012972-CZ

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Before: SAAD, P.J., and OWENS and K.F. KELLY, JJ.

PER CURIAM.

Defendant Oakland Livingston Human Service Agency (OLHSA) appeals by leave granted a Livingston Circuit Court order denying OLHSA's application for leave to appeal a probate court order for lack of jurisdiction. Defendant Guardian Care, Inc. (GCI) filed a concurrence and a cross-appeal, agreeing with this position. We reverse and remand.

In the instant case, circuit court No. 12-12972-CZ, plaintiff alleges breach of fiduciary duty and conversion by her former guardians and conservators, OLHSA and GCI, while a conservatorship was in place between March 18, 2009 and February 11, 2011, in probate court No. 08-10592-CA. In the underlying protective proceeding, OLHSA learned that one of its employees, Laura Turner, embezzled approximately \$6,000 of plaintiff's funds.<sup>1</sup> According to plaintiff, OLHSA asked the probate court to remove it as conservator, without disclosing the embezzlement. GCI was appointed to take its place and, due to Turner's misrepresentations,

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<sup>1</sup> Turner pleaded guilty to one count of embezzlement.

OLHSA's final accounting was approved on July 8, 2010. According to the deposition of one of OLHSA's supervisors, Turner revealed her deception and embezzlement on July 12, 2010. However, this information apparently was not released to GCI, or if it was, GCI did not act on it and file a motion for relief from judgment or for any other relief on plaintiff's behalf.

In December 2010, plaintiff petitioned the court to terminate the conservatorship. At that time, plaintiff argued, *inter alia*, that GCI was not properly representing her interests. On January 11, 2011, the probate court allowed GCI to resign, and appointed a temporary conservator for plaintiff, and on January 14, 2011, GCI filed its first and final accounting on plaintiff's behalf. Plaintiff filed objections to the accounting, which included allegations of misconduct committed by GCI, specifically that GCI failed to adequately investigate "malfeasance" OLHSA had committed involving Turner's actions. The probate court then found that plaintiff was no longer in need of a conservator, and allowed the temporary conservator to resign. It continued the contested hearing on GCI's final account, and ultimately decided that the allegations of failure to investigate and other wrongdoing would not be heard in reviewing the final accounting, but could be brought in a separate suit. It allowed plaintiff only to contest "those financial matters actually listed on GCI's first and final account, and . . . ruled on plaintiff's objections that addressed income or disbursements that were disputed by plaintiff." On April 20, 2011, the probate court allowed GCI's first and final account. The probate court's order also provided that GCI would be discharged upon GCI filing proof of transfer of the conservatorship assets to plaintiff. However, apparently due to plaintiff's refusal to sign paperwork acknowledging transfer, GCI remains the conservator in file No. 08-10592-CA and that case remains open.

On October 4, 2011, plaintiff commenced a civil action in circuit court, alleging that both OLHSA and GCI breached their fiduciary duties as conservator for plaintiff, and converted plaintiff's property. Plaintiff claims that OLHSA's first and final accounts, which the probate court approved, were procured by fraud because the embezzlement was known to OLHSA but not disclosed until after the final account was approved. Plaintiff also alleged that GCI's opening inventory based on OLHSA's final account was inaccurate, as was GCI's final account. On January 6, 2012, that case was transferred to the Livingston Probate Court.

Subsequently, both OLHSA and GCI moved for summary disposition, raising various rationales in support of their motions, including claims that the time for appealing or moving for relief from judgment from the probate court's orders accepting defendants' final accountings had run, and that res judicata barred plaintiff's claims in the instant case. The probate court denied defendants' motions, and vacated the order approving GCI's final accounting.

OLHSA filed an application for leave to appeal with the circuit court. At the scheduled hearing for oral argument, the circuit court ruled that it lacked jurisdiction. OLHSA subsequently filed an application for leave to appeal with this Court and moved for peremptory reversal. GCI concurred in OLHSA's application and motion. This Court granted leave to appeal, but denied the motion for peremptory reversal. *Button v Oakland Livingston Human Serv Agency*, unpublished order of the Court of Appeals, entered December 13, 2013 (Docket No. 314952).

OLHSA first argues that the circuit court erred when it found that it did not have jurisdiction to review the probate court's order denying summary disposition for defendants. Subject matter jurisdiction is a question of law that we review de novo. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 472; 628 NW2d 577 (2001).

We find that the circuit court had jurisdiction to decide OLHSA's application for leave to appeal the probate court order denying defendants' motions for summary disposition. The order that OLHSA sought to appeal to the circuit court was an interlocutory order. See *Mossing v Demlow Prods, Inc*, 287 Mich App 87, 93; 782 NW2d 780 (2010) (stating that an order denying summary disposition "is inherently interlocutory.").

The court rules governing probate court proceedings contain a subchapter on appeals, 5.800. MCR 5.801(D) addresses appeals from interlocutory orders of the probate court, and provides in pertinent part:

*An interlocutory order, such as an order regarding discovery; ruling on evidence; appointing a guardian ad litem; or suspending a fiduciary for failure to give a new bond, to file an inventory, or to render an account, may be appealed only to the circuit court and only by leave of that court. . . .* [Emphasis added.]

The court rules governing appeals to the circuit court similarly provide that the circuit court has appellate jurisdiction over interlocutory orders of the probate court. MCR 7.103(B)(1)(a) provides that a "circuit court may grant leave to appeal from . . . a judgment or order of a trial court when . . . no appeal of right exists." (Emphasis added; paragraph structure omitted). For the purposes of subchapter 7.100, "trial court" is defined as "the district, probate, or municipal court from which the 'appeal' is taken." MCR 7.102(9).

More specifically, in *In re Beatrice Rottenberg Living Trust*, 300 Mich App 339; 833 NW2d 384 (2013), this Court discussed the status of a probate court order granting partial summary disposition in favor of petitioner. The Court found that the order was not appealable by right to the Court because it was "in no sense a 'final order' within the meaning of MCR 5.801(B)(2)" because it "did not did not 'affect[] with finality the rights of the parties in the subject matter' " *Id.* at 354, quoting *In re Miller Estate*, 106 Mich App 222, 224; 307 NW2d 450 (1981).

As in *Rottenberg*, here, the probate court's November 7, 2012 order denying summary disposition did not resolve or affect defendants' rights with finality. This is true, even though the order also vacated GCI's final accounting in probate file No. 08-10592-CA, because that file remains open, GCI has not been discharged as a conservator, and now a new accounting must be approved. In addition, none of the specified exceptions listed in MCR 5.801(B)(2) that allow a limited number of probate court final orders to be appealed directly to this Court apply in the instant case. While presumably the probate court could have certified this interlocutory order as one involving "a controlling question of law as to which there is substantial ground for difference of opinion and that an appeal directly to the Court of Appeals may materially advance the ultimate termination of the litigation" under MCR 5.801(F), it did not do so.

Therefore, we find that the circuit court had jurisdiction to hear OLHSA's application for leave from the probate court order in file No. 12-12972-CZ.

Defendants also raise a number of issues concerning the probate court's November 7, 2012 underlying order denying their motions for summary disposition. However, because we find that the circuit court has jurisdiction to hear defendants' appeals, we need not reach these issues.

Reversed and remanded. We do not retain jurisdiction.

/s/ Henry William Saad  
/s/ Donald S. Owens  
/s/ Kirsten Frank Kelly